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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JOSEPH ANTHONY SINGLETON,  
  
Defendant and Appellant.

C059007  
  
(Super. Ct. No.  
07F07384)

A jury found defendant Joseph Anthony Singleton guilty of two counts of willful infliction of corporal injury. (Pen. Code, § 273.5, subd. (a).)<sup>1</sup> In a bifurcated proceeding, the trial court found a prior prison term allegation true. The court denied probation and sentenced defendant to an aggregate term of five years in state prison.

On appeal, defendant contends (1) the trial court failed to instruct the jury on the reasonable use of force to counter

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<sup>1</sup> Hereafter, undesignated statutory references are to the Penal Code.

false imprisonment, (2) the trial court violated defendant's Sixth Amendment right to assistance of counsel when it sustained an objection to a portion of defendant's closing argument, (3) defense counsel's consent to withdraw jury instructions related to defense of property constituted ineffective assistance of counsel, (4) the court erred when it "forc[ed] counsel to represent to the jury that the lesser included offense instructions were being given solely at [defendant's] behest rather than as part of the court's obligation to so charge," and (5) the court committed prejudicial error by instructing the jury on flight pursuant to CALCRIM No. 372 in the absence of evidence to support that instruction. We affirm the judgment.

#### FACTUAL AND PROCEDURAL HISTORY

Defendant is married to Shamarra Gallow Singleton. At the time of trial, their daughter was four years old, and Shamarra was five and a half months pregnant with their second child.

##### *June 17, 2007, Incident*

In June 2007, Shamarra and defendant were living at a house on Erickson Street. Defendant also spent some time at his grandmother's house. The relationship between the couple was strained.

On June 17, 2007, police responded to a domestic violence call on Erickson Street. They found Shamarra, who was visibly shaken, crying and extremely upset. She had bruises consistent with finger marks on the side of her neck, some scratches on her

face, a split and swollen lip and an "extremely swollen" face.<sup>2</sup> Shamarra said defendant had picked her up at work and, on the drive home, he turned the radio up. When Shamarra asked him to turn it down, he increased the volume. Shamarra said, "Why you got to be like that, bitch?" Defendant responded by punching and slapping her in the face while he continued to drive, causing the car to swerve all over the road.

When they arrived home, Shamarra told defendant, "You're gonna go to jail for hitting me like that," and tried to run to the house. However, because of her cerebral palsy, she was unable to outrun defendant, who caught up to her, ripped her shirt, threw her to the ground and began punching and slapping her. The next door neighbor came out to help, but retreated when defendant threatened to kill him if he called the police.

Defendant took Shamarra into the house and into the bedroom. He told her, "If I can't have you, no man will," and punched and choked her until she lost consciousness. When she came to, they argued briefly about whether or not he could take her car, then defendant took the keys and left. Their daughter was on the couch sleeping during the altercation.

Shamarra called the police and told them defendant had assaulted her and stolen her truck. In the 911 tape, played for the jury at trial, Shamarra told the 911 dispatcher she was

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<sup>2</sup> Pictures taken of Shamarra at the scene showed her face was scratched and swollen and she had injuries to her cheek, lip and neck.

trying to get to the house and defendant told her to shut up or he was going to beat her more. Shamarra told the dispatcher, "[H]e just damn near choked the shit out of me. . . . I almost died . . . ."

Shamarra was transported to the hospital as a precautionary measure and later released. Attempts by police to contact Shamarra's neighbor were unsuccessful.

Lori Morris, then a victims' advocate in the domestic violence unit of the district attorney's office, contacted Shamarra by telephone on September 26, 2007. Shamarra told Morris she was married to defendant, but they were in the process of divorcing. Shamarra said she was fearful of defendant if he were to be released from custody and said she would like the court to issue an order prohibiting contact. Morris read to Shamarra the statement Shamarra had given to police at the time of the June 2007 incident and asked whether there were any changes, additions or corrections that needed to be made. Shamarra said the statement was "most definitely accurate." Shamarra also confirmed that she received injuries to her face as a result of the incident. When asked how she would like to see the case resolved, she requested counseling for defendant.

*Shamarra's Trial Testimony Regarding June 2007 Incident:*

Shamarra testified that when defendant picked her up from work, she told him the music was too loud and turned down the radio. When defendant turned the radio back up and told her to

leave it alone, Shamarra hit him in the eye.<sup>3</sup> Defendant became angry and told Shamarra he "didn't want this and he didn't need this" and that they were split up because she was "too aggressive."

Shamarra testified further that, when they arrived home, defendant got their daughter out of the car and put her in the house. He gathered up his clothes and put them in a bin. Shamarra told him not to leave and grabbed his clothes, throwing them all over the front yard in an attempt to keep him from leaving so they could talk. Defendant "back-handed" Shamarra in the face and told her to leave him alone. Shamarra told him not to take her truck and said she was going to call the police. Defendant picked up his clothes and left in the truck, and Shamarra called the police.

Shamarra also testified that she has cerebral palsy, which affects her balance, causes her to fall down on occasion, and sometimes causes her to have seizures and blackouts. She often finds unexplained bruises, cuts and scratches on her body as a result.

Shamarra confirmed that the 911 tape was an accurate recitation of what she told police that day; however, on cross-examination, she denied that defendant choked or strangled her,

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<sup>3</sup> Shamarra admitted she never said anything about hitting defendant in the eye when she spoke to police on June 17, 2007, nor did she make any mention of hitting defendant in the eye while testifying at the preliminary hearing.

explaining that defendant just wanted to get away from her so he pushed and hit her when she got in his way.

*September 17, 2007, Incident*

In September 2007, Shamarra lived on Jarvis Lane with her daughter. Defendant had keys to the house but was staying with his grandmother.

At approximately 2:22 p.m. on September 17, 2007, Sacramento County Sheriff's Deputy Tracy Brooks responded to a domestic violence call on Jarvis Lane.<sup>4</sup> Shamarra had several small scratches and marks on her neck and shoulder. She told Brooks she was home upstairs that morning when she heard banging outside. She went downstairs and found defendant kicking the sliding glass door in an effort to force his way in. Shamarra attempted to dial 911 on her cell phone, but defendant came in, took the phone from her, picked her up by her neck and carried her to the kitchen, where he threw her through the door leading to the garage.<sup>5</sup> When she landed on the floor, defendant got on top of her and began choking her. After puncturing one of the tires on her car, he took her keys and fled in another vehicle.

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<sup>4</sup> Shamarra first walked to the sheriff's substation across the street from her home to report the assault. However, after waiting "two hours" to give a statement, she called 911 from the sheriff's substation and told the dispatcher she was in pain and was going back home. The dispatcher told her that an officer would be sent to her home. The parties stipulated that the first dispatch occurred at 10:07 a.m.

<sup>5</sup> Police observed that the door frame was splintered and severely cracked.

A detective investigating the report spoke with Shamarra on September 25, 2007. The detective read the summary of Shamarra's statement taken by police at the time of the incident and Shamarra confirmed that it was accurate.

However, Shamarra told Lisa Corral, a victims' advocate at the domestic violence unit of the district attorney's office, that she was no longer fearful of defendant and did not want a no-contact order issued. She explained to Corral that she had called defendant to "com[e] over to drive her car and spend time with their child," but changed her mind when defendant said some things she did not like. According to Shamarra, when defendant attempted to leave, he "nudged" her, causing her to trip over a metal strip and fall into the door leading to the garage. She confirmed that defendant grabbed and threw her phone, but denied he choked her. Shamarra told Corral she did not feel good about testifying, and felt the case could be resolved if defendant received counseling and anger management.

*Shamarra's Trial Testimony Regarding September 2007 Incident:*

Shamarra testified that she took defendant's backpack containing his house keys. She called him to see if he wanted to come to the house to see his daughter, but when he arrived, she refused to let him in. Defendant forced the sliding glass door open. When Shamarra threatened to call the police, defendant grabbed her cell phone. He looked around for his backpack but could not find it, so he headed toward the garage door to leave. Shamarra blocked the doorway to the garage and asked for the keys to the car. Defendant "nudged" Shamarra out

of the way, causing her to trip and fall through the door and into the garage, damaging the door in the process.

As defendant gathered some of his things from the garage, Shamarra got a knife and flattened two of the tires on his car to keep him from leaving. Defendant, in turn, flattened a tire on Shamarra's truck. Defendant got in his car and tried to drive away, but Shamarra jumped behind the car to stop him. When she refused to move out of the way, defendant got out and pushed her out of the way. As defendant drove off, Shamarra chased after the car in an unsuccessful attempt to grab the cell phone out of defendant's hand.

Defendant was charged with two counts of infliction of corporal injury (§ 273, subd. (a) -- counts one and two), one count of malicious injury to a wireless device with intent to prevent use of the device to notify law enforcement (§ 591.5 -- count three) and willful injury to a child (§ 273a, subd. (b) -- count four).<sup>6</sup> The information also alleged defendant had served a prior prison term. (§ 667.5, subd. (b).)

The jury found defendant guilty of counts one and two, and not guilty of count three. Defendant waived his right to a jury trial on the prior prison term allegation. The court found that allegation true following a bifurcated proceeding.

The court denied probation and sentenced defendant to the middle term of three years on count one, plus a consecutive one-

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<sup>6</sup> At the conclusion of the prosecution's case, the court dismissed count four.

year term (one-third the middle term) on count two, and a consecutive one-year term for the prior prison term enhancement, for an aggregate sentence of five years in state prison.

Defendant filed a timely notice of appeal.

## DISCUSSION

### I

Defendant contends there was substantial evidence to support an instruction to the jury on the reasonable use of force to counter false imprisonment. We disagree.

#### *Background*

Defense counsel submitted a proposed pinpoint instruction entitled "False Imprisonment -- Reasonable Force."<sup>7</sup> Counsel argued the evidence showed "a degree of false imprisonment" during both incidents -- the first being Shamarra's attempt to keep defendant from leaving by throwing his clothes all over the yard during the June 17, 2007, incident, and the second being Shamarra's attempt to keep defendant from leaving by "holding onto the inside of the door frame" during the September 17, 2007, incident. Counsel argued that Shamarra "got in his way," "blocked his path" and "would not allow him to leave."

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<sup>7</sup> The requested instruction, a modification of CALCRIM No. 1242, read as follows: "It is unlawful for a person to intentionally and unlawfully detain or confine a person when that act made the person who wished to leave stay against his will. If you believe that [the defendant] was intentionally detained against his will in either incident, you may consider those facts in deciding whether [defendant] acted in self defense when he attempted to leave."

Therefore, the "nudge" to get her out of the way was "reasonable self-defense or reasonable force" for defendant to "defend himself from the false imprisonment." The prosecution argued the evidence did not suggest false imprisonment in either incident.

The court ruled as follows: "I think it is a very creative use, not only of the English language, but of the law in false imprisonment. Courts are required to give pinpoint instructions for either party when the facts warrant it, but keeping in mind a pinpoint should not be argumentative. [¶] I think that the fact that this Court is going to be giving the instruction on self-defense is more than sufficient for the concept here, which is the person has a right to defend themselves, and I think that this instruction is factually very, very weak and not supported by the evidence. I think it is also argumentative in tone. [¶] That being said, you in no way are precluded from arguing that he had a right to self-defense in the circumstance in which he was faced when she was, I guess, attempting to block his access to the garage. I deny giving this pinpoint instructions [sic] for several reasons: [¶] One, I don't think factually it's supported by the evidence. I think -- and I would agree with [the district attorney's] view that by all accounts, inconsistent or otherwise, [defendant] forced his way into that house through the slider. The victim testified that the lock on that slider was broken. She even testified to that in court before he forced his way in that that lock was broken for what it's worth. [¶] In addition, we also heard testimony that

there was another door, the front door. I just think it really strains reason to give this type of instruction. I think it is argumentative. And, again, I don't think it's borne out by the evidence in this case. In doing so you are not precluded from arguing that he had a right to defend himself under these circumstances."

### *Analysis*

"It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation] -- evidence sufficient for a reasonable jury to find in favor of the defendant [citation] -- unless the defense is inconsistent with the defendant's theory of the case [citation]." (*People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) A jury instruction need not be given whenever any evidence is presented, no matter how weak. Rather, the defendant must present evidence sufficient to deserve consideration by the jury. (*People v. Strozier* (1993) 20 Cal.App.4th 55, 63.)

Defendant argues Shamarra's testimony provides substantial evidence to support the requested instruction as to both incidents, namely that she tried to keep defendant from leaving by grabbing his clothes from the container and throwing them about the lawn, and by holding onto the garage door to keep him from leaving. We disagree.

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) Misdemeanor false

imprisonment requires that the defendant intentionally restrained, confined, or detained a person, and that the defendant's act made the person stay or go somewhere against that person's will. (CALCRIM No. 1242; *People v. Haney* (1977) 75 Cal.App.3d 308, 313.) The requested instruction was not supported by the evidence.

According to Shamarra, during the June 2007 incident, she grabbed defendant's clothes and threw them on the lawn because she wanted defendant to stay and talk with her. She did not physically restrain defendant, nor did she threaten him or in any way prevent him from leaving. They were outside of the house. He was free to come and go, and free to move about. He could quite easily have picked up his clothes or simply left them on the lawn and walked or driven away. Under those circumstances, an instruction on false imprisonment was not warranted.

With regard to the September 17, 2007, incident, Shamarra testified that she stood in the doorway to the garage in an attempt to keep defendant from leaving. Other than blocking the doorway with her body, there was no evidence she physically restrained defendant or in any way threatened him. Even assuming Shamarra's actions prevented defendant from leaving through the garage door, he was free to leave the house through either the front door or the sliding glass door he first used to enter the house. The evidence is not sufficient to warrant an instruction on false imprisonment.

In any event, any instructional error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Contrary to her previous statements to police and victims' advocates, and contrary to her 911 calls following both incidents, Shamarra testified that she was the aggressor and defendant was merely trying to defend himself against her. The jurors had the opportunity to observe Shamarra on the stand and judge for themselves whether they believed her testimony. The fact that the jury found defendant guilty of two counts of willful infliction of corporal injury suggests they did not. Furthermore, the court did not preclude defendant from arguing he had a right to defend himself under the circumstances. Indeed, defendant did argue to the jury that he had a right to use reasonable force to defend himself. He argued he used reasonable force because he wanted to leave, telling the jury he simply put his hand back and tried to "slap" Shamarra away because he just wanted to "get out of Dodge," and that he "nudged" her through the garage door because "[h]e was trying to leave." He also argued he had a right to defend his property, despite the fact that he eventually withdrew his request for a defense of property instruction. Although argument to the jury is not a substitute for a proper jury instruction, such argument is further support for a finding of harmless error. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1111.)

Defendant's theory was that Shamarra manipulated the system by lying whenever defendant would not communicate with her. The evidence to support that theory is Shamarra's trial testimony

contradicting her 911 calls and her prior statements to police. However, there is substantial evidence to support Shamarra's original version of events, including her confirmation long after the incident that the statements given to police were accurate, the pictures showing her injuries, and pictures and testimony regarding damage to the sliding door and the door to the garage. Based on the totality of the evidence, it is not reasonably probable the jury would have reached a different conclusion if the court had instructed the jury regarding reasonable force to counter false imprisonment as requested by defendant.

## II

During defendant's closing argument, defense counsel argued as follows: "The other part of that -- if I can't have you no man will -- that to me seems very interesting. Why would [defendant], who's wanting to leave, who has filed for whatever -- divorce, separation, whatever -- why would he care if another man could have her?" The court sustained the prosecution's objection that the statement assumes facts not in evidence.

Defendant contends that, by sustaining the objection to the statement, "If I can't have you, no man will," the court denied him his Sixth Amendment right to assistance of counsel. Defendant ignores the remainder of the statement to which the objection was asserted, i.e., that defendant wanted to leave Shamarra. While Shamarra testified that defendant filed for divorce, there was no testimony that defendant actually wanted to leave her. Indeed, in September 2007, he continued to spend

some of his time at Shamarra's house, and he and Shamarra conceived a second child together. The objection was properly sustained. There was no error.

### III

Defendant contends his attorney's consent to withdraw a request for jury instructions on defense of property resulted in prejudicial ineffective assistance of counsel. We disagree.

#### *Background*

During closing argument, defense counsel made the following statement: "The right to defend against personal property, I think that one might be a stretch. When the Judge suggested that we put that in or when the Judge brought it to me, I thought about it. Said, sure, why not. Maybe that was the defense lawyer in me. [¶] I'm not even going to talk about it because, frankly, I don't think that -- I think it's too far of a stretch for you to even consider that, but you will be instructed on that and you will have to take the time to think about that."

At the conclusion of counsel's closing argument and outside the presence of the jury, the following colloquy took place between the court and counsel:

"THE COURT: [Defense counsel], during the course of your closing arguments you made comments that I took issue with during the break right before lunch because you had argued to this jury that it was the Court's view and not yours that certain instructions be given, specifically self-defense and defense of property. [¶] You also argued that this crime

either . . . happened or it didn't, and you were gonna get lessers that you also didn't agree with giving. In light of your closing arguments, would you like to withdraw the Court's giving of the lesser offenses?

"[Defense counsel]: No, but I would request the Court's permission to apologize. Essentially -- not apologize, but correct the record.

"THE COURT: What exactly are you going to tell this jury . . . ? I'll tell what you [sic] my biggest concerns are. Both sides are entitled to a fair trial.

"[Defense counsel]: I understand.

"THE COURT: It's unfair to the People for this jury to have the belief that I think that certain instructions should have been given. I'll make it very clear. I'm constrained by the law to give certain instructions. [¶] I don't think that defense of property is an appropriate defense in this case, but there is some scintilla of evidence, and you've requested the jury instruction be given, and I will give the jury instruction because of rulings of [a]ppellate courts that necessitate under these conditions that certain defenses be given. [¶] I also don't think that self-defense is a viable theory in this case, but there is a scintilla of evidence that permits you to argue self-defense. But when you tell this jury that this Court's giving certain instructions that you've not requested and that it was essentially the Court's idea, it leaves them with the impression that, my gosh, if the Judge is giving these instructions, maybe the Judge thinks it's self-defense and

defense of property are warranted. [¶] So what are you going to tell the jury?

"[Defense counsel]: I absolutely understand, Judge. And I -- honestly was a mistake on my part. I did not mean it to come out the way it did, but I have written what I would like to say.

"THE COURT: Have you shown it to [the prosecutor]?

"[Defense counsel]: I haven't.

"THE COURT: Go ahead, [prosecutor]. Why don't you take a look at it first because you're -- frankly, you're the real wronged party here.

"[Defense counsel]: Judge, I have a second copy to save time. [¶] Your Honor, I am happy to modify it any way that seems appropriate.

"THE COURT: [Prosecutor], what's your position on this?

"[Prosecutor]: I think that's appropriate.

"THE COURT: All right. That's fine, [defense counsel].

"[Defense counsel]: And, again, Judge, for the record, I do apologize. That really wasn't -- you know, when you're on that -- up at the podium you're doing what you're doing. This really came -- my theory came to me, I guess, more fully as I was preparing my closing. [¶] Um, and since you did ask, I would request to withdraw, um, the defense of prop -- defense of property. I don't see any reason. I put it in my closing that it was a stretch at best, and I've argued that to the jury. So I don't have a problem with withdrawing defense of property from the jury instruction.

"THE COURT: You're going to tell the jury that you've -- that you are withdrawing the defense of property because you don't think it applies in this case?

"[Defense counsel]: I will tell them that.

"THE COURT: Okay. Go ahead and make that amendment."

After the jury reconvened, defense counsel addressed them as follows: "I'm sorry, ladies and gentlemen. I have to do this. I thought of something over the lunch, and it is very quick. [¶] Ladies and gentlemen of the jury, Counsel, Your Honor, um, I asked to come back briefly just to -- because I may have mislead [sic] you in my closing, and I did not intend to do that in two areas of my argument. [¶] During my closing I told you that with regard to the defense of property instruction that the Judge had suggested it or words to that effect. That is not the case, and I should not have said that or even inferred that. [¶] I believe that I felt previously that defense of property did have some merit in this case. You saw my slide presentation. I put on there it was a stretch to get there, and at this time I will withdraw my request for that instruction. So that you will not be considering defense of property in your deliberations. [¶] Um, it is my job as a defense lawyer, um, to request defense instructions. It's not the Judge's job to give them or request them or order them. So I do not want you to infer that she suggested that something else should have been given. [¶] On that note, I may have also misled you to believe that the Judge somehow forced upon us or asked us to add the lesser crimes that you have heard about -- simple assault,

simple battery, simple battery against a spouse or cohabitant. That's not the case. [¶] Again, it is a defense job to ask for those things. They're not required to be given. And I did, in fact, ask for those things. So I apologize for you -- to you if I misled you in any way. [¶] It was me who asked for the lessers. It was me who asked for the defense. It was not the Judge who put them on -- put them in the packet just for your benefit or for my benefit. The defense strategy is up to me. And within the law, that is, as long as it's within the law, the defense strategy is up to me. [¶] And if I request a lesser because facts support that, um, the judges are required to give [it] to a certain extent. So for any misleading I may have done inadvertently, I apologize for that. I just wanted to make sure you all understood that. Thank you."

### *Analysis*

Defendant claims his trial attorney was "upbraided" by the court for portions of his closing argument and then directed by the court to address the jury. As a result, counsel withdrew his request for the defense of property instruction and told the jury the lesser included offense instructions were being given at his request rather than pursuant to an obligation of the court. This, defendant urges, was ineffective assistance of counsel. We are not persuaded.

The burden of proving a claim of ineffective assistance of counsel is upon defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) To meet this burden, he must prove (1) counsel's representation was deficient, i.e., it fell below an objective

standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the defense to prejudice, i.e., there is a reasonable probability that but for counsel's failings, the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [80 L.Ed.2d 674, 693, 698]; *People v. Bell* (1989) 49 Cal.3d 502, 546.)

A criminal conviction will be reversed for ineffective assistance "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Where the record ""sheds no light"" on the reason for counsel's omission, we affirm ""unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation."" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Defendant claims his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms because he withdrew his request for a defense of property instruction despite the fact that defense of property was a "viable issue" in the June 17, 2007, incident, and his attorney succumbed to pressure from the court to tell the jury the lesser included offense instructions were given at defendant's request, not pursuant to any obligation on the part of the court. Defendant claims the impact of those errors reduced his trial "to a farce and a sham."

First, defendant mischaracterizes the colloquy between counsel and the court, and counsel's ensuing statements to the jury. The court took issue with defense counsel's suggestion to the jury that certain instructions, namely self-defense and defense of property, were given at the court's behest, not defendant's. The court also took issue with counsel's suggestion that defendant did not agree with the court giving lesser included offense instructions. In light of that comment, the court asked defense counsel whether he would like to withdraw the request for the lesser included offense instructions. Counsel declined to do so, but requested the opportunity to "correct the record." The court expressed its opinion that neither defense of property nor self-defense were appropriate defenses, but given the "scintilla of evidence" for each, the court assured counsel it would give those jury instructions at defendant's request. Nonetheless, defense counsel withdrew his request for a defense of property instruction, noting he had already argued that point to the jury. Counsel also confirmed he was withdrawing the request because he no longer felt the defense was applicable.

Thereafter, defense counsel elected to address the jury to clarify his prior statements in closing argument. He told the jury that he requested the defense of property instruction and did not intend to imply that it had been forced on defendant by the court. In that regard, he explained that it was defense counsel's job to request jury instructions; it was not the court's job to give, request or order them.

Given the totality of the circumstances, counsel's explanation was not only appropriate but accurate. "A trial court must sua sponte instruct 'on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.' [Citation.] The trial court must instruct the jury on all elements of the charged offenses. [Citation.] As to additional matters 'falling outside the definition of a "general principle of law governing the case," it is "defendant's obligation to request any clarifying or amplifying instruction."' [Citation.]" (*People v. Mays* (2007) 148 Cal.App.4th 13, 36.) The trial court is not obligated to instruct sua sponte on theories unsupported or only weakly supported by the evidence. (*People v. Reeves* (2001) 91 Cal.App.4th 14, 51.)

Similarly, with regard to the lesser included offense instructions, counsel explained that defendant requested those instructions and did not intend to imply that they had been forced on defendant by the court. Again, he explained it was defense counsel's job to determine the trial strategy and request instructions accordingly; it was then the court's job to give the requested instructions as required by law.

Counsel's explanation was again appropriate and accurate. It is well-established that the trial court is only obliged to instruct, even without a request, on the lesser-included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation],

but not when there is no evidence that the offense was less than that charged. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The court has no duty to instruct on lesser included offenses that are not supported by substantial evidence (*id.* at p. 162) and substantial evidence in this context is ““evidence from which a jury composed of reasonable [persons] could . . . conclude[]”” that the lesser offense, but not the greater, was committed. [Citations.]” (*Ibid.*) If the evidence is only minimal and insubstantial, there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5.; *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1410.) Here, the court instructed the jury on the lesser included offenses as requested by defendant.

Next, there is little mystery as to why counsel would make the tactical choice of withdrawing the defense of property instruction. The only evidence to support the defense was Shamarra’s contradictory trial testimony that defendant “back-handed” her in the face in response to her grabbing his clothes and throwing them on the lawn. As counsel conceded, basing the defense on that evidence alone was a “stretch.” The fact that there was no evidence defendant’s clothing was ever in danger of being damaged or destroyed was reason enough to withdraw the requested instruction. However, the additional fact that Shamarra had cerebral palsy, making it difficult for her to run or maintain her balance, and the sheer difference in size between Shamarra and defendant, a fact the jury had the opportunity to observe first-hand throughout the trial, would

certainly have led reasonable counsel to withdraw the instruction request in an effort to avoid raising the jury's ire and to focus its attention on more meritorious defenses.

We reject defendant's claim of ineffective assistance of counsel.

#### IV

Defendant contends the court erred when it "forc[ed] counsel to represent to the jury that the lesser included offense instructions were being given solely at [defendant's] behest rather than as part of the court's obligation to so charge." Without further explanation, defendant argues this error "severely denigrated the possibility that the jury would consider the lesser includeds along with its consideration of the charged offenses -- as it was entitled to under the law."

As we explained at length in part III of the Discussion, defendant mischaracterizes the colloquy between counsel and the court. The court expressed concern regarding counsel's suggestion that defendant was being forced to give the lesser included offense instructions. In light of that statement, the court asked whether defendant wanted to withdraw the requested instructions. Defense counsel responded in the negative, but elected to address the jury to "correct the record." The court did not force defendant to do so, nor did it direct defendant to make any particular representation to the jury. Counsel crafted a proposed statement and, without objection from the prosecution, addressed the jury in that regard. The jury was thereafter instructed accordingly. There was no error.

Lastly, defendant contends the court erred by instructing the jury regarding flight pursuant to CALCRIM No. 372.<sup>8</sup> He argues there was no evidence he fled from either incident to escape detection or capture, only that he left because of a desire not to be there. We reject that contention.

We begin by noting that defendant did not object to this instruction at trial. "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson*[, *supra*,] 46 Cal.2d 818. [Citation.]" (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) We find no error, much less a miscarriage of justice.

Section 1127c provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The

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<sup>8</sup> The jury was instructed with CALCRIM No. 372, which states: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilty by itself."

weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given."

A flight instruction is proper where evidence "'shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' [Citation.] "'[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

"'A flight instruction is proper whenever evidence of the circumstances of [a] defendant's departure from the crime scene . . . logically permits an inference that his movement was motivated by guilty knowledge.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 522, quoting *People v. Turner* (1990) 50 Cal.3d 668, 694.)

Here, there was sufficient evidence of flight in both incidents. During the June 17, 2007, incident in the car, Shamarra told defendant when they arrived home, "You're gonna go to jail for hitting me like that." As the assault continued on the front lawn, defendant threatened to kill the neighbor if he called the police. Once inside the house, defendant took the car keys without Shamarra's consent and left. Even if the jury believed Shamarra's contradictory trial testimony, that testimony alone provides evidence of flight as well. Shamarra testified that, after defendant back-handed her in the face, she

told defendant not to take her truck and said she was going to call the police. Defendant took the truck and left immediately. In either case, the facts provide sufficient evidence that defendant was motivated to leave in order to avoid contact with the police.

With regard to the September 17, 2007, incident, Shamarra told police defendant threw her through the door to the garage and choked her. He then punctured one of her tires, took her keys and fled in another vehicle. Those statements provide ample evidence of flight. Shamarra's trial testimony provides sufficient evidence as well. She testified that, after defendant "nudged" her, sending her entire body through the door into the garage, she punctured two of his tires. Defendant then punctured one of the tires on Shamarra's car and drove off in his car despite having two flat tires. When Shamarra jumped behind the car to block his exit, defendant pushed her out of the way and took off, with Shamarra chasing after the car.

The evidence was sufficient to support instructing the jury pursuant to CALCRIM No. 372. Yet, even if it were not, reversal is not required. The instruction does not state that defendant did flee or that flight establishes guilt. To the contrary, it says that flight, if proved, may be considered in deciding guilt or innocence, but is not sufficient in itself to establish guilt. In *People v. Crandell* (1988) 46 Cal.3d 833, cert. den. April 24, 1989, NO. 88-6574, 490 U.S. 1037 [104 L.Ed.2d 408], abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365, in support of its ruling that an

erroneous instruction on flight was harmless error, our Supreme Court observed, in part, that "the instruction [does] not posit the existence of flight; both the existence and significance of flight [are] left to the jury." (*People v. Crandell, supra*, 46 Cal.3d at p. 870.)

We find no instructional error.

DISPOSITION

The judgment is affirmed.

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NICHOLSON, J.

We concur:

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BLEASE, Acting P. J.

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CANTIL-SAKAUYE, J.